

Halachic Perspectives On the Death Penalty

The United States is one of the last holdouts among the civilized nations to maintain, at least for the most heinous of crimes, the age-old penalty of execution, and even within the country, a vast gulf in attitude as well as practice divides liberal jurisdictions such as New York from conservative ones such as Texas.

While the Torah is certainly forthright in enjoining the death penalty, repeatedly insisting that the transgressors of a variety of sins are to be stoned, burned and otherwise executed, a more careful analysis of its view, encompassing the Oral Torah in addition to the Written one, yields a considerably more nuanced picture. While the four classic methods of execution are indeed prescribed for no less than thirty six distinct sins¹, the Sages of the Mishnah warn against excessive use of the ultimate punishment:

A Sanhedrin that kills once in seven years is called sanguinary. R. Eliezer b. Azariah says: Once in seventy years². R. Tarfon and R. Akiva say: Had we been in the Sanhedrin, no one would ever have been killed³.

The conclusion of the Mishnah, however, succinctly expresses the opposite concern, that an overly lax punitive regimen will be an insufficient deterrent against crime, murder in particular:

R. Shimon b. Gamliel says: They, too, increase the spillers of blood in Israel.

The Theoretical Vs. The Practical

There are various indications in the Talmud that while the Torah's system of criminal law may embody absolute Truth and Justice, it may nevertheless (or perhaps, precisely *because* of this) not always suffice as a practical regimen for the deterrence and punishment of crime. So, on the one hand, various Tannaim maintain that entire sections of capital jurisprudence are of purely theoretical interest, for they apply only under conditions that are so implausible that “[they] have not occurred, and [they] never will occur”⁴, while on the other hand, we have an account of the judicial stoning of one guilty merely of riding a horse on Shabbas in the days of the Greeks “not because he deserves this, but because the era needs it”⁵.

Rav Moshe Feinstein was consulted by “a minister of the State” on “the opinion of the Torah ... which is the true opinion” on the death penalty. He explains that while the Torah does prescribe the penalty for “very serious crimes”, such as murder and other egregious offenses, this is not out of “hatred for the doers of evil” or a “fear for the stability of the world” - for God can manage such matters on His own⁶. The true purpose of the terrible penalty, he explains, is rather **education**: “so that men shall know the severity of these prohibitions and not violate them”. In

1 Rambam, *Yad Ha'Chazakah* Hilchos Sanhedrin 15:10-13.

2 The Gemara is unsure if this opinion maintains that once in seventy years is considered normal or sanguinary.

3 Makos 7a. The Gemara explains that R. Akiva and R. Tarfon would propose exceedingly implausible, but technically possible, exculpatory alternatives to what the witnesses appear to have seen. The other Sages reject such defenses.

4 Sanhedrin 71a.

5 *Ibid.* 46a and Yevamos 90b; see Choshen Mishpat Siman 2 for further discussion of this principle.

6 Note, however, that *Noda Be'Yehudah* takes for granted that the purpose of the death penalty for certain sins is so that “man shall fear violating them” (Orach Chaim Kama #35, s.v. Elah she'omer ani).

the remainder of his response, Rav Moshe elaborates on the Torah's numerous procedural safeguards against improper executions, among which he includes the inadmissibility of circumstantial evidence, no matter how strong, and the requirement of testimony of two valid, disinterested witnesses, “and certainly not .. witnesses who have been promised amnesty from punishment if they testify against others” - a pointed barb against the American reliance on cooperating witnesses who may be guilty themselves, but have been offered a plea bargain in exchange for the incrimination of others⁷.

Remorse and Repentance

In Western judicial systems, remorse is often an important argument in favor of pardoning a convicted criminal or commuting his sentence. The Talmud, in contrast, flatly rejects this possibility:

Rabbi Akiva says: ... those liable to judicial execution ... [even] if they repent, the terrestrial court does not absolve them⁸.

But why is this so? Is not the wonderful, total efficacy of repentance a fundamental dogma of Judaism?

The Aharonim have offered various explanations for this rule, one of the most famous of which is Rav Yechezkel Landau's: since true repentance is internal, it will generally be impossible for a court to ascertain whether a sinner has truly repented, and if we allow the convict to declare “I have sinned, and behold, I repent”, no one would ever be executed, and the institution of the death penalty would thus be vitiated⁹.

As Dr. Nachum Rakover points out¹⁰, R. Landau's basic point was advanced centuries earlier by Rav Moshe di Trani (Mabit): “For the court cannot audit [the sinner's] heart, if he has a conviction of repentance or not”¹¹. Mabit also explains that although one who repents is no longer considered a sinner, and is even considered a righteous man, very serious sins can nevertheless not be totally expunged without punishment.

7 *Resp. Igros Moshe*, Choshen Mishpat II:68.

8 *Makos* 13b.

9 *Noda Be'Yehuda*, *ibid*.

10 *Takanas Ha'Shavim (I): Does Repentance Absolve One From Punishment?*, available [here](#).

11 *Bais Elokim*, Sha'ar Ha'Teshuvah Chapter 2 s.v. Ve'chen be'chillul Hashem. For further analysis and other perspectives on the question, see Dr. Rakover's wonderfully erudite survey of the topic